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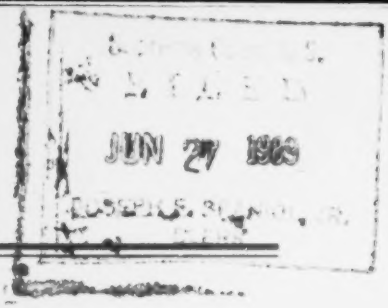

In The

Supreme Court of the United States

October Term, 1989

LOYER EDUCATIONAL TRUST,
LARRY McDONALD, TRUSTEE,

Petitioner,

v.

WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY, Individually, Jointly and Severally, now County of Wayne, its Successor in Interest,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

– AND APPENDICES –

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QUESTIONS PRESENTED

I.

WHETHER A STATE MUST ENTERTAIN A CLAIM UNDER 42 USC § 1983?

II.

WHEN A GOVERNMENT AGENCY CREATES A SYSTEM OF FINANCING PUBLIC ROAD IMPROVEMENTS NOT OTHERWISE CREATED BY STATE STATUTE EMPOWERING THE AGENCY, HAS THE AGENCY USURPED THE LEGISLATIVE TAXING AUTHORITY OF THE STATE IN CONFLICT WITH THE PRONOUNCEMENTS OF THIS COURT'S DECISIONS?

III.

WHEN A LOCAL GOVERNMENT AGENCY, PURSUANT TO AN ADMINISTRATIVE RULE, REGULATES THE ENTRY BY A PRIVATE PROPERTY DRIVEWAY TO AN UNIMPROVED PUBLIC STREET BY REQUIRING THE ENTERING OWNER TO CONSTRUCT OFF-SITE CAPITAL IMPROVEMENTS WITHOUT A STANDARD FOR APPORTIONING THE COST OF THOSE IMPROVEMENTS AMONG THE ABUTTING LANDOWNERS AND THE PUBLIC, HAS THE PRIVATE PROPERTY OWNER BEEN DEPRIVED OF "DUE PROCESS OF LAW" AND "EQUAL PROTECTION OF THE LAW" WITHIN THE MEANING OF THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION?

IV.

WHEN A LOCAL GOVERNMENT AGENCY DENIES ACCESS TO A PUBLIC ROAD TO AN OWNER OF PRIVATE PROPERTY BY DEMANDING AN EXACTION NOT DEFINED BY THE LEGISLATION, HAS THERE BEEN A TAKING OF THE USE OF THE PROPERTY REQUIRING THE APPLICATION OF THE "JUST COMPENSATION" CLAUSE FOR THE REGULATORY TAKING OF THE USE OF THE PROPERTY?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Michigan Supreme Court.

The Township of Brownstown was dismissed at an earlier stage of the proceedings as a Defendant and is not a party to this appeal.

The Michigan Municipal League was granted leave to file an *Amicus* Brief in the Michigan Supreme Court on behalf of all the municipalities in the State of Michigan.

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OPINIONS BELOW

The opinion of the Trial Court was not published and is attached (Appendix H). The Court of Appeals' decision was published at 168 Mich App 587, 425 NW2d 189 (1988); a copy of the opinion is attached (Appendix B).

The Michigan Supreme Court denied LOYER's Application for Leave to Appeal (Appendix E) by Order denying leave to appeal but granting the Michigan Municipal League's request to file a brief *Amicus Curiæ* (Appendix D) on December 29, 1988.

LOYER filed a timely Motion for Reconsideration (Appendix C) in the Michigan Supreme Court, which

was also denied upon its Order dated March 29, 1989 (Appendix B).

LOYER claimed throughout the proceedings:

A. a violation of its Federal Statutory Civil Rights
B. a violation of "Due Process" and "Equal Protection"
C. a "Taking without Just Compensation"
D. lack of statutory authority to deny a driveway permit.

The Michigan Courts denied the claims in a perfunctory fashion with no analysis of the Federal Claims raised.

JURISDICTION

A timely notice of Appeal to this Court was filed June 19, 1989 (Appendix A).

Jurisdiction of this Court is invoked pursuant to 28 USC § 1257, because a local administrative rule was challenged as violating the U.S. Constitution and the rule was upheld by the Michigan Courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Fifth Amendment, United States Constitution:

> ". . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

- Fourteenth Amendment, United States Constitution:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities

> of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

- *Driveways, Banners, Events and Parades – An Act to Regulate Driveways, Banners and Parades Upon and Over Highways*; Mich. Comp. Laws Ann. § 247.234; Mich. Stat. Ann. § 9.140(24) (see Appendix N).

- *Rules, Standards and Procedures for Driveways*, p. 10:

> "The permit applicant shall provide a passing lane on the side of the highway directly opposite a proposed commercial, industrial, apartment driveway or other heavy traffic generators when warranted in accordance with the highway vehicle volume and anticipated peak hour vehicle left turns from the highway as shown in Figure 7. When other conditions such as horizontal and vertical sight distance, traffic signal location and other physical factors directly affect public safety, a passing lane shall be required. Minimum dimensions for a passing lane are shown in Figure 8 of the Road Commission rule adopted by them."

The Complaint alleged the Federal Statutory Civil Rights Act violation, in addition to the "Taking" issue (Appendix L). The Federal issues were raised at the earliest possible time and evidence was introduced at trial to support the claims. These issues were briefed and raised throughout the appellate process.

STATEMENT OF THE CASE

Plaintiff, LOYER EDUCATIONAL TRUST, hereinafter referred to as LOYER, was created by Lavern and Frances

Loyer to provide for the education of their children. The trust purpose having expired with the education of their children, the surplus or corpus of the trust was invested in a two and one-half acre parcel of property in Brownstown Township to develop Sibley Plaza, a strip shopping center ("shopping center").

LOYER applied for permits from Brownstown Township to construct the twenty-three thousand square foot shopping center on land located on the South side of Sibley Road, a two-lane gravel shoulder road, in Wayne County. Sibley Road right-of-way runs East/West through the southern portion of Wayne County; it has a maximum speed limit of 45 miles per hour at the location of the shopping center and is owned and maintained in public trust by the Wayne County Road Commission.

Construction of the commercial development was commenced in accordance with the architect's drawings, which had been submitted to and approved by the Township's Planning Commission and Building Department. Loyer Construction Company was hired to build the shopping center. The construction company is located directly behind the shopping center site and operates a soil field at the location.

The Trust thereafter applied for a permit from the Wayne County Road Commission ("Road Commission") to construct a driveway from the shopping center to Sibley Road, in order to give the public ingress and egress to the various business establishments which were to be located there. The Road Commission refused to grant the permit, citing as its reason that it was first necessary for LOYER to expend its own funds to pave two additional lanes for Sibley Road, one on LOYER's side and one on the opposite side.

Before it would grant the driveway permit and in order to accommodate such passing lanes, the Road

Commission also mandated that LOYER totally absorb the cost of relocating or enclosing a major county drain on the opposite side of the road, specifically, the Van Clief Drain, which runs parallel to Sibley Road on its northern edge. This drain could hold a car without the top being seen.

The Road Commission also demanded that, as part of the lane improvements, a private road by the name of Emit be improved where the intersection joined Sibley Road. This street also was on the opposite side of Sibley from the shopping center development. The improvement to Emit Street consisted of having to remove the culvert or drainage tile under the present intersection of Emit Street and paving the intersection where it enters Sibley Road. Emit Street services a subdivision which lies to the North of Sibley Road. Emit is an unimproved gravel drive which has never been dedicated to the Township or County for maintenance.

In an attempt to exact the costs of these expensive road improvements from LOYER rather than by using county general tax funds or creating a special assessment tax district, as set forth in the law, the Road Commission further demanded, as part of the permit process, that LOYER install all of these improvements. This high-speed passing lane was to abut no property that was owned by LOYER; it would greatly enhance the quality of the Sibley Road surface and increase the value of the property located across the road from the shopping center, thereby giving a windfall to the county and surrounding land owners because the road would be finished for all at LOYER's expense.

LOYER estimated these off-site improvements to cost over ONE HUNDRED THOUSAND ($100,000.00) DOLLARS. LOYER arranged meetings with the Road Commission in order to analyze alternative plans proposed,

including relocating the driveway, and offering to put in the lane on its side of the road. The Road Commission offered to allow LOYER to post a bond for the improvements, but would not guarantee the ceiling on the bond. The Road Commission would have required LOYER to pay any additional charges if their estimate of forty thousand ($40,000.00) Dollars was too low. LOYER declined to post the bond because it was an open-ended offer with no ceiling for the improvements required of them.

Having been thwarted at every attempt by the Road Commission, the shopping center remains unopened.

LOYER brought this action to compel the Wayne County Road Commission to issue its permit and/or restrain its interference with the opening of the driveway to the shopping center. LOYER contended that there was no statutory authority under *Driveways, Banners, Events and Parades,* MCLA § 247.234; MSA § 9.140(21), to allow a county road commission to coerce a private landowner to install off-site improvements in a county road at the landowner's expense.

LOYER also requested money damages for losses incurred for its inability to open for business.

The Wayne County Circuit Court denied the request for Mandamus or in the alternative an Injunction and left Plaintiff to its remedy of money damages. These damages consisted of loss of rents while the shopping center remained closed, and claims for discriminatory treatment. The testimony as to these damages was unrebutted at trial and remain uncontroverted as well as continuing.

The testimony at trial, by the Road Commission's own Engineer, admitted that no standard existed for apportioning the cost of off-site improvements.

LOYER's counsel asked the question of Mr. Richardson, the County Engineer, at p. 291, line 24 of the transcript:

> "Q. Do you have some kind of policy or standard drawn up at the old Wayne County Road Commission that would decide who has to pay what and when?
>
> "A. No.
>
> "Q. And pretty much it is left to the staff members as they see a situation: is that not correct?
>
> "A. In this situation it was a staff determination."

LOYER claimed damages for the taking of its opportunity to open the shopping center, and for discriminatory treatment between itself and a competitor located down the street in that no standard was established to apportion costs for off-site improvements. The competitor paid six thousand ($6,000.00) dollars for its improvements, which were similar in nature to LOYER. The Road Commission reasoned that the competitor had just selected a better location to build. The Trial Court adopted this position without any further analysis.

LOYER also claimed a taking from it by way of the requested improvements which benefitted the landowners on the opposite side of the street and the public at large. LOYER claimed that this action was also discriminatory.

LOYER also claimed all use of the property was taken by the refusal to issue the permit.

The Trial Court held LOYER had no cause of action. The Wayne County Circuit Court issued an opinion which upheld the Road Commission's denial of a drive-

way permit. The Trial Court reasoned that rules promulgated pursuant to the *Driveway Act*, § 9.140(24), Rules and Standards, gave authority to the Road Commission to deny LOYER a permit unless it put in the required improvements on the opposite side of Sibley Road (pp. 2 and 3 of Trial Court's opinion, Appendix H, pp. H-2–H-3).

The Michigan Court of Appeals upheld the Trial Court's decision. Furthermore, the Court of Appeals held that there was no taking from LOYER nor disparate treatment of LOYER and therefore, no damages were owing to LOYER (p. 6 of Court of Appeals' opinion, Appendix F, pp. F-7–F-8).

It is from these findings LOYER appealed to the Michigan Supreme Court.

The Michigan Supreme Court declined to grant leave to appeal, after a timely notice and application were filed (Appendices D and E).

After a Motion for Reconsideration was filed, the Michigan Supreme Court again declined to hear the case (Appendix B).

It is from this denial of the Motion for Reconsideration that a Petition for Certiorari is brought to this Honorable Court.

BACKGROUND

The Michigan Courts have navigated a course which carried them into unconstitutional waters in the present case. Michigan suddenly veered from the true course for two reasons, which caused them to arrive at an improper result. The reasons are quite clear:

A. The Michigan Courts made a herculean effort to avoid a meaningful analysis of Federal Statu-

tory and Constitutional protections when raised in the context of a state action. Prior case law was consistent with the requested finding in *LOYER* except for one glaring difference — LOYER requested money damages for violation of its Federal Statutory Civil Rights, an unconstitutional "Taking without Compensation" and violation of "Due Process" and "Equal Protection." Fifth and Fourteenth Amendments to the United States Constitution.

B. The Michigan Courts allowed the Road Commission to raise money for road improvements without the need for tax legislation.

Unless this Court acts to compel the Michigan Courts to recognize these violations, a citizen in Michigan who asserts these claims will not have a forum in which to be heard.

A. The *Arrowhead* Analysis

The Michigan Courts decided two cases which set out a responsible and constitutional approach to exactions:

In *Arrowhead Development Co.* v *Livingston County Road Comm'n.*, 413 Mich 505, 322 NW2d 702 (1982), the Michigan Supreme Court found that the County Road Law and the *Subdivision Control Act* were devoid of any statutory authority whereby a county road commission could compel a private developer to install off-site road improvements on a county-owned road as a precondition to receiving county approval of a plat and subsequent construction project. In addressing the contention of the Livingston County Road Commission under County Road Law, the high court in Michigan stated:

> ". . . The permissible methods of financing county road improvements are borrowing and

> taxation. Nowhere in the statute is there to be found authorization for exacting the cost of a county road improvement from a subdivision developer, and we think none can be fairly implied. *Id.* at 512-13, NW2d at 706."

In the *LOYER* case, we are merely dealing with a driveway and not a subdivision development. The County has forbidden approval of a permit to open the facility and begin to conduct business based on a driveway permit. The legislature enacted Act 200, 1969, p. 382, *Driveway, Banners, Events and Parades – An Act to Regulate Driveways, Banners and Parades Upon and Over Highways,* Mich. Comp. Laws Ann. § 247.234; Mich. Stat. Ann. § 9.140(24) (Appendix N).

The *Driveway Act* indicates that permits for driveways shall be granted in conformity with rules promulgated by the Highway Authority. Nowhere in the Act does it say that the Authority can compel off-site improvements as part of the permit process. The Road Commission granted themselves that authority through adoption of their own rules.

In addition to the passing lane, in this case, the Road Commission required the enclosure of a major county drain and the pavement of a private road intersection on the opposite side of the street. It is this type of unreasonable requirement which the Michigan Supreme Court addressed itself to in *Arrowhead, supra* at 709:

> "We hold that the Commission exceeded its limited statutory powers in conditioning the plat approval upon Arrowhead's agreement to pay for the off-site county road improvement. Consequently, the judgment of the Court of Appeals is reversed."

It is clear from this holding by the Michigan Supreme Court that the statutory authority of the County Road Commission does not extend to forcing developers to pay for off-site road improvements.

In *Arrowhead*, the defendant, Livingston County Road Commission also contended, under General Highway Law, Mich. Comp. Laws Ann. § 224, that a provision of the *Subdivision Control Act*, MCLA § 560.183; MSA § 26.430(180), was sufficient authority to precondition plat approval on the implementation of off-site road improvements by the private developer. The Supreme Court, however, rejected this alternate theory and found that:

Section 183, in relevant part, provides:

> "(1) The county road commission may require . . .
>
> > "(b) Adequate provision for traffic safety in laying out drives which enter county roads and streets, as provided in the board's current published construction standards. *Id.* at 515, NW2d at 707."

The Court found that this statutory language, after reading the statute as a whole, was insufficient to confer authority upon the county road commission to compel the private developer to install off-site road improvements. The statutory language, in the present case, relied upon by the Road Commission, relates to the same safety provision as that under the *Subdivision Control Act, supra*, in which the Supreme Court found no explicit or implied authority to impose the cost of off-site road improvements on the developer.

The facts of the case at bar and the statutory language of the *Driveway Act* merited a judicial interpretation consistent with that of the Supreme Court in

Arrowhead. In *Arrowhead*, the road improvement was to be located on a part of the road not abutting or adjoining the developer's property. In the present case, the proposed passing lane and attendant drain diversion and intersection improvement are to be located on the opposite side of Sibley Road, not adjoining or abutting plaintiff's property, but adjoining property owned by unrelated third parties. The Court in *Arrowhead* addressed this issue by stating:

> "... it would be impermissible to impose the entire cost of an off-site improvement on a single subdivision developer, where other persons or property would be specifically benefited. The absence of a statutory provision establishing standards and procedures for such apportionment is indicative of a legislative assumption that the responsibilities of a subdivision developer do not extend beyond the borders of the subdivision itself unless explicitly imposed by the Legislature." *Id.* at 519, NW2d at 709.

Under the current demands of the Road Commission, LOYER will be forced to improve a county-owned road at private expense. The proposed improvements will not only enhance the quality of the county road, but will increase the property values of third-party owners who will be directly benefitted by the construction. Additionally, the County requirements would force LOYER to improve an intersection for a private road.

LOYER asked that the Michigan Court find that the defendant, Road Commission, was without statutory authority to precondition the granting of a driveway permit on the installation of off-site road improvements by the plaintiff, LOYER. This they declined to do.

B. Direct Application Of The *Arrowhead* Analysis Was Warranted Under The Further Case Delineation By The Court Of Appeals In Michigan.

In *Charter Township of Harrison* v *Calisi*, 121 Mich App 777, 329 NW2d 488 (1982), the Michigan Court of Appeals accepted the opportunity to apply the rationale of the *Arrowhead* case to the *Township Rural Zoning Act*, MCLA § 125.286 *et seq.*; MSA § 5.2963 *et seq.* The defendant, Calisi, owned a restaurant and nightclub facility in Harrison Township and applied for a permit to improve and expand his establishment. Following review of the submitted site plan, the Township preconditioned construction approval on a requirement that Calisi construct a deceleration or bypass lane at the entrance of his establishment, in order to maintain a steady flow of traffic on the main thoroughfare. The Township claimed statutory authority to precondition approval under the *Township Rural Zoning Act*. The Court rejected that position and relied on *Arrowhead*.

The Court said:

> "By finding that the plaintiff was without authority to impose the requirements that it attempted, we necessarily must find that its theories for enforcing such requirements must fail." *Calisi, id.* at 787-88.

In *Calisi*, the Court of Appeals, noting the similarities between the facts and statutes involved, found it instructive to apply the judicial construction and rationale of the *Arrowhead* Court to the *Township Rural Zoning Act*. The *Driveway Act* presently relied on by the Road Commission also has, if not a direct relationship to the *County Road Law* and the *Subdivision Control Act*, at least "an obvious relationship to

the acts considered in *Arrowhead Development Co.* v *Livingston County Road Comm'n.*." *Calisi, supra* at 492.

C. Application Of Pending Legislation Indicates Intent Of The Legislature Not To Have The *Driveway Act* Apply To Road Improvements In The Right-Of-Way.

The promulgation of the rules for driveways far exceeded the rule-making contemplated by the *Driveway Act*, MCLA § 247.234; MSA § 9.140(24), as the Road Commission contends. The legislature made no provision for allocating the cost of the improvements which are "public" in nature. Therefore, it cannot be contended that the *Driveway Act* allows the Road Commission to legislate the allocation of costs to the developer in the LOYER case because the legislature did not intend that result.

The Michigan Legislature had before it Senate Bill No. 157 which was introduced March 18, 1987.[1]

It is clear that the legislature did not intend the *Driveway Act* to cover the situation claimed by Wayne

---

[1] "(1) The rules or ordinance may require the developer to dedicate land or pay fees or cash, or both, for completion of all or a portion of road improvements or operations required by a development. A rule or ordinance requiring a dedication or payment shall prescribe at which point in the procedure the dedication or payment is required. The value of land dedicated by a developer under this act shall be credited against the fee to be paid by that developer.

"(2) The rules or ordinance shall prescribe the basis on which a dedication or payment is required based on a traffic impact analysis of present road capacity and future traffic generated by the development and a cost estimate for the necessary road improvements or operations. A fee required under a rule or ordinance may include the cost of required traffic studies."

County when it proposed a Bill to deal with the exactions claimed from LOYER. *Arrowhead* sets out a clearly-delineated path: An administrative body may not impose off-site burdens on property pursuant to their own rule making. They must have a legislative mandate for compelling off-site improvements.

REASONS FOR GRANTING THE WRIT

I.

WHETHER A STATE *MUST* ENTERTAIN A CLAIM UNDER 42 USC § 1983?

Testa v *Katt*, 330 US 386, 391 (1904), set forth the following proposition while quoting *Claflin* v *Houseman*, 93 US 130, 137 (1876).

> "'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State Court.'"

Martinez v *California*, 444 US 277 (1980), adopted the general rule above stated and cited in footnote 8:

> "Conduct by persons acting under color of state law which is wrongful under 42 USC § 1983 or § 1985(3) cannot be immunized by state law." *Id.* at 284.

LOYER pled a Federal Civil Rights Act violation in its original State Court Complaint.

LOYER proved by the Road Commission's own admission:

a. No standard existed for apportioning the costs for off-site improvements; and

b. Private individuals and the public would be specifically benefitted on the opposite side of the road by the improvements required by LOYER without regard to the benefit/burden placed on LOYER, i.e., LOYER finishes the road for all, who now may develop their land without payment of the cost imposed on LOYER.

This was clearly discriminatory, arbitrary and capricious action by the State for which LOYER should have recovered. The Trial Court failed to address this issue. The Court of Appeals held that there was no discriminatory treatment without any analysis or discussion whatsoever.

The Michigan Courts' decision, in light of the foregoing can be analyzed in one of two ways:

1. The decision was clearly erroneous; or

2. The State merely ignored the claim without a discussion of the basis for their finding.

LOYER requires this Court's mandate if Federal Constitutional and Statutory claims are to have any meaningful analysis in the Michigan Courts, as opposed to merely perfunctory treatment.

II.

WHEN A GOVERNMENT AGENCY CREATES A SYSTEM OF FINANCING PUBLIC ROAD IMPROVEMENTS NOT OTHERWISE CREATED BY STATE STATUTE EMPOWERING THE AGENCY, HAS THE AGENCY USURPED THE LEGISLATIVE TAXING AUTHORITY OF THE STATE IN CONFLICT WITH THE PRONOUNCEMENTS OF THIS COURT'S DECISIONS?

The issue is whether a local government agency can define an exaction by an administrative rule. The answer

is: NO. The legislatures create exactions by "Police Power," "Eminent Domain" or "Taxing Authority." Administrative agencies merely implement what the legislature creates. To allow an administrative agency to start creating substantive rights subverts our entire constitutional process.

National Cable Television Assoc. v *United States and Federal Communications Commission*, 415 US 336, 94 S. Ct. 1146, 39 LEd2d 370 (1974), would not allow an administrative agency to assess an excessive fee for a permit because it was merely a disguised tax. Only the legislature has the power to tax.

The Michigan Court's decision in *LOYER* allows the Road Commission to become a taxing authority rather than a regulating authority.

LOYER was required to construct improvements for its neighbors and the County. This, the Road Commission could not force LOYER to do as part of obtaining a driveway permit because it amounted to a tax under the analysis of *National Cable*. The enabling legislation, the *Driveway Act*, set forth no standards for apportioning the cost of off-site improvements, nor was there a grant of such authority to the County, either express or implied in the Act.

National Cable set forth the following:

> "The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. It would be such a sharp break with our traditions to conclude that Congress has bestowed on a federal

> agency the taxing power . . . ." *National Cable, supra* at 342.

LOYER was taxed by the agency and it was upheld by the Michigan Court, thus creating the deprivation of federal constitutional rights to "Due Process" and "Equal Protection" of the law. This was an improper delegation to the Road Commission of "Taxing Authority" which was vested in the Michigan Legislature.

In *French* v *Barber Asphalt Paving Co.*, 184 US 324 (1901), the Court, quoting *Norwood* v *Baker*, 172 US 269 (1898), held:

> ". . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency. Dillon's Municipal Corporations, Vol. 2, § 752, 4th ed." *Id.* at 344.

In *LOYER* there was no legislation creating a "Driveway Tax" for off-site improvements — only administratively adopted rules. The rules had *no standards at all* for apportionment of off-site costs among private landowners and the public, who were both specially benefitted by the required improvements.

III.

WHEN A LOCAL GOVERNMENT AGENCY, PURSUANT TO AN ADMINISTRATIVE RULE, REGULATES THE ENTRY BY A PRIVATE PROPERTY DRIVEWAY TO AN UNIMPROVED PUBLIC STREET BY REQUIRING THE ENTERING OWNER TO CONSTRUCT OFF-SITE CAPITAL IMPROVEMENTS WITHOUT A STANDARD FOR APPORTIONING THE COST OF THOSE IMPROVEMENTS AMONG THE ABUTTING LANDOWNERS AND THE PUBLIC, HAS THE PRIVATE PROPERTY OWNER BEEN DEPRIVED OF "DUE PROCESS OF LAW" AND "EQUAL PROTECTION OF THE LAW" WITHIN THE MEANING OF THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION?

The Michigan Court's ruling in *LOYER* sets in place an unconstitutional action by the Road Commission.

The testimony at trial by the County Engineer was clear and unequivocal: THERE WAS NO STANDARD TO DETERMINE WHO HAS TO PAY WHAT AND WHEN. The Road Commission's own testimony establishes that there was no standard whatsoever.

The lack of a standard is a prima facie case for lack of "Due Process" and "Equal Protection." *Pan Fil, et al.* v *City of Detroit*, 246 Mich 149, 224 NW 616 (1929). See also 46 ALR 3d 127, Widening of City Street as Local Improvement Justifying Special Assessment of Adjacent Property.

Here there was testimony that the completion of the road and drain improvements were not only for public benefit but also private benefit in that opposite side of the road owners would now have to pay nothing for street or drain improvements to develop their property.

For example: Two people in the same position, i.e., holding undeveloped land, wishing to put in a driveway, are treated unequally. The imposition of the costs of all improvements against one is inapposite to the guaran-

tees of the "equal protection clause"; however, this is exactly what happened to LOYER and presumably anyone who is the first to put in a driveway in an undeveloped area.

Denial of certiorari or failure to review this issue will allow local governments to arbitrarily and capriciously declare, for example, that the first owners to install a driveway on a street will pay for road paving and drainage. Hardly a constitutionally protected action.

The test for "Due Process" of a tax is set forth in the line of cases from this Court as stated in *Frick* v *Pennsylvania*, 268 US 473 (1925), *Mt. St. Mary's Cemetery Assoc.* v *Mullins*, 248 US 501 (1919), *Dane* v *Jackson*, 256 US 589 (1921) and *Cass Farm Co.* v *Detroit*, 181 US 396 (1900).

In *LOYER* there was *no standard* set up to apportion the costs of off-site or public improvements on people installing driveways. The imposition of all costs on LOYER was a deprivation of "Due Process" because it amounted to confiscation, not the regulation of a driveway.

The administrative officials' actions, coupled with the State Court actions in *LOYER* were of such a nature as to constitute an intentional and deliberate attempt to violate the Federal Statutory Civil Rights and Constitutional Rights of LOYER.

The impact on LOYER or any developer who is first to develop in an area where the infrastructure is not in place is unequal to other developers who, for example, seek to develop across the road one day after LOYER's improvements are in place. They are both in the same taxing unit; however, the first in time is penalized and not treated equally to others in the same unit.

IV.

WHEN A LOCAL GOVERNMENT AGENCY DENIES ACCESS TO A PUBLIC ROAD TO AN OWNER OF PRIVATE PROPERTY BY DEMANDING AN EXACTION NOT DEFINED BY THE LEGISLATION, HAS THERE BEEN A TAKING OF THE USE OF THE PROPERTY REQUIRING THE APPLICATION OF THE "JUST COMPENSATION" CLAUSE FOR THE REGULATORY TAKING OF THE USE OF THE PROPERTY?

"Just Compensation" as a remedy in regulatory taking cases in light of the holdings of this Court in the cases of *First English Evangelical Lutheran Church of Glendale* v *County of Los Angeles, California*, 482 US 304, 96 LEd2d 250, 107 S.Ct. 2378 (1987), and *Nollan* v *California Coastal Commission*, 483 US 825, 107 S.Ct. 3141 (1987), would be applicable to *LOYER*. *LOYER* more clearly resembles *First English* in that a non-invasive regulatory taking occurred which deprived LOYER of all use of the property. While this "Taking" occurred outside the Zoning arena, it was nevertheless as devastating and final as the action taken in *First English*.

This issue was raised and briefed throughout these proceedings.

If a government agency stops a person from using their property they are taking it from that person if there is no authority for such action.

The government acts with color of authority. The power thus derived gives it an intimidating and overwhelming advantage over the individual. Individuals are nearly powerless to wage long legal struggles against government due to cost or time. These are the stark realities of life.

To allow a government to avoid paying compensation for prohibiting the use of property upon a finding that

the conduct of the government was improper would deny meaningful private property rights to everyone.

The local government authorities would be more inclined to act with measured restraint as opposed to uninhibited arrogance, if they were facing money damages for their unlawful actions.

The *LOYER* case takes this Court to a watershed in the development of "Taking Without Just Compensation" cases.

In *LOYER*, this Court merely has to consider whether the *improper* conduct of a local government agency prohibiting use of land constitutes a taking within the meaning of the V and XIV Amendments.

If, as in *LOYER*, the *improper* conduct prohibited use, then compensation should be paid.

The Michigan Courts never reached this issue. The Michigan Courts have allowed the Road Commissioners to continue their abusive practices in violation of Federal Statutory and Constitutional mandates to the contrary.

CONCLUSION

The analysis is clear:

Where an exaction is contemplated, a legislative branch of government must define the exaction, either under its "Police Power," "Eminent Domain," "Taxing Authority," or some other constitutional authority granted to it.

An administrative agency may define the character of the exaction, i.e., the type of concrete, pipe, or stone, once granted. However, the administrative agency may not create the exaction itself because it has no authority to do so. It is a legislative function.

Furthermore, the legislature must create a standard within the legislation creating the exaction to guide the administrative body in carrying out the Act itself.

This Court's intervention is mandated if the people of the State of Michigan are to have meaningful protection of their federal constitutional and statutory rights in view of the State Courts' refusal to consider them.

It seems a logical conclusion that a State should determine its own law in a federal statutory and constitutional setting in order to allow the State to "get its own house in order," rather than allowing federal courts to define substantive state law. Only when abuses occur, as in the *LOYER* case, should the federal courts step in to protect against such abuse.

Monetary damages should be available to aggrieved parties in those case where a non-invasive regulatory taking has in fact occurred. LOYER's property was no less taken than if the County came in and occupied it.

If this Court declines to hear this case it could signal the state courts to disrupt their own system of *Stare Decisis* and Jurisprudence in order to avoid addressing federal issues, as the Michigan Courts have done in the *LOYER* case.

Respectfully submitted,

By: /s/ M. GARY HOLLAND
Counsel of Record
23394 Goddard Road
Taylor, Michigan 48101
(313) 292-0288

Attorney for Petitioner,
LOYER EDUCATIONAL TRUST,
LARRY McDONALD, TRUSTEE

DATED: June 26, 1989

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(State of Michigan — Supreme Court)

(Received June 19, 1989)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff/Appellant, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Supreme Court No. 83452; Court of Appeals No. 93959; Wayne County Circuit Court No. 83334841 CZ)

Notice is hereby given that Loyer Educational Trust, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Michigan Supreme Court dismissing the Motion for Rehearing of Application for Leave to Appeal entered March 29, 1989.

This Appeal is taken pursuant to Title 28, USC Section 1257.

M. Gary Holland P23197
Attorney at Law
23394 Goddard Road
Taylor, Michigan 48180

DATED: June 19, 1989

PROOF OF MAILING

STATE OF MICHIGAN
COUNTY OF WAYNE — ss

M. GARY HOLLAND, being first duly sworn, deposes and says that on the 19th day of June, 1989, he personally served a true copy of: NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon the Clerk of the Michigan Supreme Court, 2nd Floor Law Building, 525 W. Ottawa, Lansing, Michigan, and mailed a true copy to:

Lawrence R. Ternan
Beier, Howlett, Ternan, Jones, Shea & Hafeli, P.C.
Attorney for Michigan Municipal League
74 W. Long Lake Road, Ste. 1
Bloomfield Hills, MI 48013

Lambro Niforos
Attorney for Defendants/Appellees Road Commission
600 Randolph, 2nd Floor
Detroit, MI 48226

by depositing said true copies in an envelope properly addressed as aforesaid, sealing same and affixing thereto appropriate first class postage, and depositing the same in a U.S. mail receptacle located in the City of Taylor, Michigan, on said date.

/s/ M. Gary Holland

Subscribed and sworn to before me
this 19th day of June, 1989.
/s/ Joyce Wooten
Notary Public, Wayne County, Michigan
Commission expires: 3/5/90

APPENDIX B

ORDER

(State of Michigan — Supreme Court)

(Entered March 29, 1989)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, v WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, and THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants-Appellees — SC: 83452; COA: 93959; LC: 83-334841-CZ)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the motion for reconsideration of this Court's order of December 29, 1988 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

(*Certification Omitted*)

APPENDIX C

MOTION FOR RECONSIDERATION

(State of Michigan — Supreme Court)

(Received January 18, 1989)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, vs WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Supreme Court No. 83452, Court of Appeals No. 93959, Wayne County Circuit Court No. 83 334 841 CZ)

Plaintiff/Appellant states in support of its MOTION FOR RECONSIDERATION:

1. On December 29, 1988, this Court issued its Order in this case.

2. The Court ordered as follows:

> "On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for leave to file a brief amicus curiae is GRANTED."

3. The Michigan Municipal League filed a Motion to be allowed to be heard in this case and indicated in their Motion in Paragraph 2, Page 2:

> ". . . this cause involves a question of great importance to all Municipal Corporations in the state."

4. This Court granted the Michigan Municipal League's Motion to File a Brief Amicus Curiae, but denied the Application for Leave to Appeal.

5. The Defendant in this case, Wayne County Road Commission, failed to file an Answer to Plaintiff's Application for Leave to Appeal.

6. The Michigan Court of Appeals issued an Opinion in this matter adverse to the Plaintiff/Appellant.

7. The Real Property Section of the State Bar of Michigan in conjunction with the Municipal Zoning Section offered a Seminar in the summer of 1988 covering various topics.

8. At that Seminar the Real Property Section and Michigan Zoning Section of the State Bar of Michigan discussed the Court of Appeals' Decision in the *Loyer* v *Wayne County Road Commission* case.

9. The Real Property Section and Michigan Zoning Section of the State Bar of Michigan concurred that the Court of Appeals Decision in the *Loyer* case was *INCORRECT.*

10. The State Bar of Michigan agreed that the Court of Appeals legal determination was not the law and that the principles of *Arrowhead Development Co.* v *Livingston County Road Comm'n.*, 413 Mich 505, 322 NW2d, 702 (1982) and *Charter Township of Harrison* v *Calisi*, 121 Mich App 777, 329 NW2d 488 (1982), are applicable to the *Loyer* case.

11. Attorney for Plaintiff/Appellant contacted the Real Property Section in view of the fact that the Michigan Municipal League had hired counsel to represent their political interests in this case pending before the Michigan Supreme Court.

12. The Real Property Section of the State Bar of Michigan has tacitly agreed to file a Brief in support of the opposite position from the Michigan Municipal League in the *Loyer* case if leave to appeal is granted by this Court.

13. The State Bar of Michigan, Real Property Section was unable to file a Brief on the Application for Leave to Appeal, but would write a Brief, if this Honorable Court would reconsider its position and grant Application for Leave to Appeal in this case.

14. The State Bar of Michigan Real Property Section is not a political entity as the Michigan Municipal League, but is merely concerned with having a correct decision founded on the law.

15. The determination sought by the Michigan Municipal League is clearly one-sided and not in the best interest of the people of the State of Michigan.

16. The municipalities in the State of Michigan are afraid of an adverse ruling in the *Loyer* case due to the fact that they have carved out an exception to State Law by taxing private individuals in order to finance or find sources of financing not presently available for the roads and drainage systems in the State of Michigan.

17. The *Loyer* case represents a unique situation; where the infrastructure is inadequate i.e. primitive roads and drainage for any type of development, the Court of Appeals Decision allows the municipality under the guise of *The Driveways, Banners and Parades, Act, 200, 1969,* Mich. Comp. Laws. Ann § 224.21; Mich. Stat. Ann. § 9.140(24), to shift the costs of developing the infrastructure to a developer who desires to develop its property in the area.

18. The problem that this creates is that a single developer could have the entire costs of the infrastructure shifted to it without any chance to recoup the costs from either the public or the landowners adjacent to the area or across the street from the area.

19. Obviously, Loyer has no recourse against the property owner on the opposite side of the street for the development costs for completing the road adjacent to its property, nor does it have the opportunity to recover or recoup compensation for the use to which the public will put the infrastructure.

20. It must be asserted here that Loyer offered to improve its side of the road, but rejected the improvements on the opposite side of the road.

21. The Decisions in *Calisi*, and *Arrowhead*, while not specifically speaking to *The Driveway Act*, nevertheless established a standard by which improvements could be financed in the public right of way. These are by special assessment district or the general taxing power of the County.

22. *The Driveway Act*, id., contained no language *APPORTIONING* the cost of improvements between the various landowners and/or the public and the developer. Nor did Wayne County develop a standard for apportioning costs in its regulations governing driveways. This is mandated by *Arrowhead* and *Calisi*.

23. In the *Loyer* case, the undeveloped nature of the area created a burden on the infrastructure.

24. The question the Supreme Court has to direct itself to is very clear:

> May a County force a developer in an area to pay the entire costs of creating an infrastructure - as

the Court of Appeals allowed through its ruling - or should those costs be apportioned among the public and adjoining landowners in some reasonable fashion where there is an inadequate infrastructure in place?

25. Plaintiff/Appellant submits that authority for this action does not lie in *The Driveway Act.*

26. *Loyer* creates a trilogy with *Arrowhead* and *Calisi* defining the rights of the individuals vis-a-vis development of offsite improvements.

27. The Court of Appeals' decision is clearly erroneous, unconstitutional and against the great weight of authority.

A. The Court of Appeals' decision is contrary to this Court's decision in *Arrowhead* and the Court of Appeals own holding in *Calisi* in that apportionment of the cost of offsite improvements is not found in *The Driveway Act.*

B. The Court of Appeals' decision upholding the County's action constituted a taking without adequate compensation by forcing *Loyer* to put in improvements for both public and private benefit.

C. The Court of Appeals' decision upholding the County's action was discriminatory and violative of due process in that *no standard* was established to apportion costs of offsite improvements.

D. The Court of Appeals' decision interpreting *The Driveway Act* broadens the authority to regulate driveways into a method of financing roads and drains. This is not expressed in *The Driveway Act* nor can it be fairly implied.

28. The hypothetical example given below points out the error in analysis in the Court of Appeals' decision:

29. Assume now that half of the people on Sibley road want to develop their property and half do not.

30. Also, assume that the half that want to improve their property are on the south side of the road and the half that do not want to improve their property are on the north side of the road.

31. Under the position advocated by the Michigan Municipal League and Wayne County, the half on the south side of the road, pursuant to the *The Driveway Act*, id., would have to put in all of the improvements, which would benefit all of the properties on the north side of the road and thereby create an infrastructure for everyone, i.e., the public and those property owners on the north side of the road, without compensation to the south side landowners.

32. This is not an allocation of costs which is either fair or legally correct.

33. These issues are of grave importance to the orderly development of the State of Michigan.

34. In view of the fact that both the Michigan Municipal League and the State Bar Real Property Section want to join the affray is further indication of the importance of a full hearing on the issues presented by *Loyer*.

WHEREFORE, Plaintiff/Appellant, Loyer, requests that this Honorable Court grant its Motion for Reconsideration and allow the parties and amicus curiae to file briefs and have oral arguments on the issues presented by this case.

Respectfully submitted,

M. Gary Holland
Attorney for Plaintiff/Appellant

AFFIDAVIT

STATE OF MICHIGAN
COUNTY OF WAYNE — ss

On this 18th day of January, 1989, before me personally appeared M. GARY HOLLAND, who made oath that he has read the foregoing MOTION FOR RECONSIDERATION, by him subscribed, and that the contents thereof are true except as to those matters stated to be upon information and belief, and as to those matters he believes them to be true.

Joyce Wooten, Notary Public
Wayne County, Michigan
My Commission Expires: 3/5/90

APPENDIX D

ORDER

(State of Michigan — Supreme Court)

(Entered December 29, 1989)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, v WAYNE COUNTY ROAD COMMISSION, THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, Individually, Jointly and Severally, now County of Wayne, its Successor in Interest, Defendants-Appellees, and BROWNSTOWN TOWNSHIP, Defendant — SC: 83452; CoA: 93959; LC: 83-334841-CZ)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for leave to file a brief amicus curiae is GRANTED.

(Certification Omitted)

APPENDIX E

APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, vs WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Supreme Court No. _____; Court of Appeals No. 93959; Wayne County Circuit Court No. 83 334 841 CZ)

Now comes Plaintiff/Appellant, by and through its attorney, M. GARY HOLLAND, and requests that this Court grant its Application for Leave to Appeal from a decision of the Court of Appeals dated May 17, 1988 in the above captioned case, and in support of its application says:

1. This action was commenced in Wayne County Circuit Court in November of 1983.

2. Plaintiff/Appellant is the owner of land upon which it built a building for use as a Shopping Center pursuant to a building permit obtained from Brownstown Township. It brought the action against the Defendant/Appellee, WAYNE COUNTY ROAD COMMISSION, seeking a Writ of Mandamus compelling the Road Commission to issue a driveway permit without the requirement of exacting costly road improvements from the Plaintiff/Appellant. In the alternative, Plaintiff/Appellant requested an Injunction barring the County from interfering with the opening of Plaintiff/Appellant's driveway.

3. Plaintiff/Appellant requested money damages for the taking by the WAYNE COUNTY ROAD COMMISSION in closing the Plaintiff/Appellant's shopping center, and for requiring Plaintiff/Appellant to make improvements for both public and private landowners before Plaintiff/Appellant was allowed reasonable access to the road.

4. Plaintiff/Appellant also requested that the WAYNE COUNTY ROAD COMMISSION be found in violation of Michigan and Federal Civil Rights Acts in addition to denial of equal protection under the law in its discriminatory treatment of Plaintiff/Appellant by allowing a competitor to open down the street from Plaintiff/Appellant without a standard for exacting the same costs from the competing developer.

5. The Plaintiff/Appellant's position is that the Defendant/Appellee had no authority to compel Plaintiff/Appellant to make major road improvements as a precondition to obtaining a driveway permit. The improvements consisted of the following:

A. Paving a passing lane on the opposite side of the street from Plaintiff/Appellant's project, a 23,000 square foot strip shopping center.

B. Paving a private gravel road intersection as part of the passing lane requirement, also located on the opposite side of the street abutting the Sibley Road Right of Way

C. Relocating a county drain or enclosing it as a requirement in installing the passing lane, also on the opposite side of the street.

D. Plaintiff/Appellant estimated the cost of these improvements to exceed ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, where the County determined that these improvements would cost FORTY THOUSAND ($40,000.00) DOLLARS.

6. The WAYNE COUNTY ROAD COMMISSION took the position that it could promulgate rules under *The Driveway Act*, MSA 9.140 (21), and did so, thus requiring the public road improvements sought from Plaintiff/Appellant as a precondition to securing a driveway permit.

7. The Wayne County Circuit Court denied Plaintiff/Appellant's motion for Writ of Mandamus or Injunction.

8. The denial of that motion was appealed to the Court of Appeals.

9. The Court of Appeals dismissed the appeal as interlocutory in that a trial on money damages had to occur before a final judgment was rendered.

10. The case went to trial before Judge RICHARD DUNN of the Wayne County Circuit Court who issued an opinion of no cause of action dated June 19, 1986.

11. The Plaintiff/Appellant appealed from the Circuit Court's decision which said in part that the County had the authority under the *Driveway Act* to compel the Plaintiff/Appellant to make the improvements and pay for them as a condition of obtaining a driveway permit.

12. The Court of Appeals rendered a decision on the Appeal of the Circuit Court's Decision which was dated May 17, 1988, and which upheld the Lower Court.

GROUNDS FOR APPEAL

13. Plaintiff/Appellant submits the following grounds for appeal pursuant to the provisions of MCR 7.302(B):

a. This appeal is of significant public interest and is against one of the subdivisions of the state. MCR 7.302(B)(2).

(i) It involves the issue of whether a subdivision of the state, the County Road Commission, pursuant to *The Driveway Act*, MCLA 247.234, MSA 9.140(21), can require an applicant for a driveway permit to make public road improvements on the opposite side of the street at his own expense where the Statute contains no provision for apportionment of the cost of those improvements between the applicant, other landowners and the public. These issues are important because they define the authority of the County Road Commissions to require exactions from individuals seeking to put in driveways.

(ii) Moreover, whether such requirement is a taking without compensation.

Furthermore, the Court of Appeals Decision in *Loyer* could cause a chilling effect on underdeveloped areas of the state due to its uncertain impact on the first to develop in an area.

b. This appeal involves legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3):

(i) Whether the WAYNE COUNTY ROAD COMMISSION can shift the cost of public improvements to Plaintiff/Appellant in the absence of clear legislative intent requiring that result.

(ii) Whether the requirement that Plaintiff/Appellant make public improvements without compensation as a condition of

obtaining a permit is a taking under Article 10§2 of the Michigan Constitution and 5th Amendment as applied through the 14th Amendment of the United States Constitution. The United States Supreme Court in *First English Evangelical Lutheran Church of Glendale* v *County of Los Angeles, California*, 96 LE2d 250, 107 S. Ct. 2378 (1987) and the Michigan Court of Appeals in *Poirer* v *Grand Blanc Township, et al*, Lawyers Weekly No. MA-5779, have held that such requirements as applies to zoning laws constituted an unlawful taking which required compensation. This issue has been raised and briefed throughout these proceedings.

(iii) Even assuming, *arguendo*, that a state subdivision can require such public improvements to be made, can it do so without any standards for payment and in a manner that results in arbitrary and discriminatory actions? Here, Plaintiff/Appellant will be required to make and pay for improvements that are not required of others and that will benefit other landowners and the public without a standard of payment.

c. The Court of Appeals decisions here conflicts with this Court's decision in *Arrowhead Development Co.* v *Livingston County Road Comm'n*, 413 Mich 505, 322 NW2d 702 (1982), and with the Court of Appeals decision in *Charter Township of Harrison* v *Calisi*, 121 Mich App 777, 329 NW2d 488 (1982), MCR 7.302 (B)(5). In *Arrowhead*, the Michigan Supreme Court held that since the *Subdivision Control Act*, MCLA 560.183, MSA 26.430 (183), did not contain a provision apportioning costs, the Act did not require nor did the Legisla-

ture intend a subdivision developer to put in public road improvements at his own expense as a precondition to obtaining approval of a Plat. The same reasoning was used by the Court of Appeals in *Calisi*, which applied *Arrowhead;* there a township could not require an individual to construct public improvements under the *Township Rural Zoning Act*, MCLA 125.286, MSA 5.2963, as the Act did not set forth a system of apportioning the costs of public road improvements and the only method of financing these were through the general taxing power of the County or a special assessment district. So, too, in *Loyer, The Driveway Act* is silent as to any apportionment of costs. Thus, the decision by the Court of Appeals in this case is inconsistent with *Arrowhead* and *Calisi.*

d. The decision of the Court of Appeals in *Loyer* is clearly erroneous and will cause material injustice. MCR 7.302(B)(5). The facts relied upon by the Court of Appeals are inconsistent with the lower court's findings of fact. The decision summarily dismissed the reasoning and holdings of *Arrowhead* and *Calisi, supra*, thereby allowing the WAYNE COUNTY ROAD COMMISSION to mandate a private individual to construct public improvements at his own expense as a precondition to obtaining a driveway permit under The Driveway Act, even though such action would be unlawful under the *Subdivision Control Act* or the *Township Rural Zoning Act.* Material injustice will result to Plaintiff/Appellant from the Court of Appeals decision in that it will be forced to either:

(i) make improvements at its own expense to benefit the public and other private land-

owners, the cost of which will threaten the economic feasibility of the development, or

(ii) abandon the development at a great economic loss.

RELIEF REQUESTED

LOYER EDUCATIONAL TRUST, respectfully requests that this Court find that the defendant, WAYNE COUNTY ROAD COMMISSION, is without statutory authority to precondition the granting of a driveway permit on the installation of the requested off-site road improvements by plaintiff, LOYER EDUCATIONAL TRUST.

Appellant further requests that this Court direct the WAYNE COUNTY ROAD COMMISSION to issue to the appellant, LOYER EDUCATIONAL TRUST, a permit in order to complete driveway construction and open the shopping facility for the public.

Plaintiff/Appellant further requests an injunction barring WAYNE COUNTY ROAD COMMISSION from interfering with the orderly operation of its Shopping Center.

Further, that this Court, find that the WAYNE COUNTY ROAD COMMISSION has, indeed, exacted a taking from Loyer without compensation and refer the case for a hearing to determine the continuing damages to LOYER EDUCATIONAL TRUST.

Respectfully,

M. Gary Holland P23197
Attorney for Plaintiff/Appellant
23394 Goddard Road
Taylor, Michigan 48180

APPENDIX F

OPINION

(State of Michigan — Court of Appeals)

(Filed May 17, 1988)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff-Appellant, v WAYNE COUNTY ROAD COMMISSION, the BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants-Appellees, and BROWNSTOWN TOWNSHIP, Defendant — No. 93959)

BEFORE: D.E. Holbrook, Jr., P.J.,
H. Hood and N.J. Kaufman*, JJ.

PER CURIAM *FOR PUBLICATION*

Plaintiff, Loyer Educational Trust, brought suit against the Wayne County Road Commission, the Board of Wayne County Road Commissioners, the individual commissioners and Brownstown Township, first seeking a preliminary injunction or writ of mandamus and later seeking money damages caused by the Road Commission's denial of a driveway permit to allow access to plaintiff's commercial development. Plaintiff's motion for a preliminary injunction or in the alternative a writ of mandamus was denied February 21, 1984, since the trial court was unconvinced that there was no appropriate legal relief available. That decision was appealed

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* Retired Court of Appeals Judge, sitting on the Court of Appeals by assignment.

to this Court and defendants filed a motion to dismiss. This Court granted defendants' motion since the denial of a preliminary injunction or writ of mandamus is not an appealable final judgment. Defendant Brownstown Township was dismissed from the suit upon the court's grant of summary disposition for plaintiff's failure to state a claim upon which relief can be granted.

In May 1986, the suit for money damages was heard by the Wayne County Circuit Court. After taking under advisement the evidence presented, the arguments, and the briefs provided by the parties, the court issued an opinion finding that plaintiff was not entitled to injunctive relief, a writ of mandamus, or money damages since defendants' conduct was not wrongful. From its judgment of no cause of action, plaintiff now appeals as of right, claiming the court's decision was legally erroneous.

The Loyer Educational Trust was established by LaVern Loyer as an education fund for his children. After his children had been educated, Loyer found that money remained in the trust which would eventually be distributed to the children. The trustee decided that a real estate development would be a good investment for the trust and hired Loyer to be the contractor of a project which became known as the Sibley Plaza Shopping Center.

Defendant constructed a shell building consisting of between 23,000 and 24,000 square feet on approximately 2 1/2 acres of land with 365-foot frontage on Sibley Road, between I-75 and Telegraph. On April 1, 1981, when the building was approximately half done, plaintiff applied, through his agent, to defendant Wayne County Road Commission, for a permit to connect to water and sewer lines and to connect a driveway to Sibley Road. The defendants stated that plaintiff could get a permit

only if plaintiff made certain modifications to the road right-of-way, including a passing lane on the north (opposite) side of Sibley Road and a widening of the pavement in front of plaintiff's property on the south side of Sibley Road as a deceleration lane, to prevent traffic congestion.

Plaintiff then constructed a driveway from the Sibley Plaza property onto a private road which was west of the shopping center site. This private road led to Loyer Construction, plaintiff's construction company which was situated behind the proposed shopping center. Construction of this driveway was unauthorized by the Road Commission. Defendants notified plaintiff that this construction was unauthorized and that a permit would be necessary. On October 14, 1981, plaintiff, under Sibley Plaza letterhead, reapplied for access to water and sewer, showing its new access to Sibley Road via the private drive leading to Loyer Construction. Defendant responded that permit could not be issued until certain modifications were made to the Sibley Road right-of-way, the Van Cleef drain and Emit Street, a private drive opposite plaintiff's property. These modifications included the addition of a passing lane on the north side of Sibley road and the movement or enclosure of the Van Cleef drain. The additional work on the drain and private drive were required because the newly proposed placement of plaintiff's driveway required the passing lane to disrupt this drain and the intersection of Emit Street with Sibley Road. Defendants based their modification requirement upon a set of rules entitled Rules, Standards and Procedures for Driveways within Wayne County Road Commission Right-of-Way, which was promulgated pursuant the Michigan Driveways, Banners, Events and Parades Act, MCL 247.321 *et seq.*; MSA 9.140(21) *et seq.*

Plaintiff refused to make the required modifications, claiming that the cost would be prohibitive and that the Road Commission had no authority to require it to pay for the improvement to the north side of Sibley Road. Plaintiff estimated that the cost of the required improvements would be $150,000 to $200,000 which would be approximately thirty percent of the entire cost of the project. Defendant, on the other hand, testified that the required improvement on the north side of the road would be between $40,000 and $50,000. Although defendants offered to let plaintiff defer the construction of the disputed improvements through the provision of letters of credit, plaintiff refused and instead proceeded to trial seeking injunctive relief or a writ of mandamus and damages.

Evidence was presented that the 24-hour traffic volume on Sibley Road during a test conducted during 1981 was 15,280 vehicles. It was projected that there would be eighty-three left turns during a peak traffic hour. There also was testimony that the passing lane would be required to safely avoid accidents.

On appeal, plaintiff claims that the Road Commission may not, pursuant to the Driveways, Banner, Events and Parades Act, MCL 247.321 *et seq*; MSA 9.140(21) *et seq.*, compel a private developer to install a passing lane and related improvements as a precondition to the granting of a driving permit. We disagree.

The purpose of the Driveways, Banners, Events and Parades Act is to regulate driveways banners, events, and parades upon highways, to promulgate rules for the regulation, and to prescribe requirements for the issuance of permits therefore. 1969 PA 200, Statement of Purpose.

Section 2 of this Act, MCL 247.322; MSA 9.140(22) provides:

> *"No driveway, banner or parade is lawful except pursuant to a permit issued in accordance with this act* unless otherwise provided. Nothing in this act shall be construed to prevent the application of the provisions of any other statute of this state or any local ordinance which is more restrictive than this act nor to preclude any city or village from requiring city or village permits with respect to any street or highway within its corporate limits. No permit shall be issued pursuant to this act unless there is compliance with other provisions of law or ordinances." (emphasis added).

Section 4 of the Act, MCL 247.324; MSA 9.140(24) provides:

> *"Permits for driveways shall be granted in conformity with rules promulgated by the highway authority which shall be consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest.* Rules shall prescribe reasonable standards for the design and the location of driveways and may require that driveways shall be hard-surfaced. The provisions of this section shall not be deemed to deny reasonable access to a nonlimited access highways." (emphasis added).

Section 5 of the Act, MCL 247.325; MSA 9.140(25) provides:

> "The department of state highways shall make rules necessary for the administration of this act in accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sec-

> tions 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Complied Laws of 1948. *The boards of county road commissioners may adopt by reference the rules, in whole or in part, of the department of state highways or may adopt its own rules after a public hearing of which notice has been given by publication at least twice in a newspaper circulated in the county not more than 30 days nor less than 7 days prior to the hearing.*" (emphasis added).

Finally, section 6 of the Act, MCL 247.326; MSA 9.140(26) provides:

> "A permit shall not be issued unless all the requirements of this act, and of rules made pursuant to section 5, are met. A permit may be revoked by the highway authority issuing it if at any time the permitted object, use, or activity fails to meet the requirements of this act or rules made in accordance with section 5." (footnote omitted).

In the instant case, the parties stipulated that the rules and regulations adopted by the Wayne County Road Commission were adopted pursuant to the statute after proper publication and hearing. There also was no dispute that the rules were adopted for the purpose of efficient and safe access to highways from private property. As required by § 4 of the Act and the Wayne County rules, a determination of the requirements of each applicant is based upon traffic volume, drainage requirements, the type of use contemplated by the adjoining land and other requirements in the public interest. The Wayne County Road Commission rules state that a

passing lane on the opposite side of the highway from a proposed commercial, industrial or multiple residential driveway be required when traffic volume reaches at least 7,700 vehicles in two hours, with twenty or more peak-hour left turns. In the instant case, there was estimated to be a 24-hour volume in 1981 of 15,280 vehicles and a projected eighty-three left turns during peak-hour traffic.

Defendants determined that the commercial nature of the development and the volume of traffic on Sibley Road necessitated the installation of a passing lane on the opposite side of the road to allow for safe and efficient left-turn traffic. Because of the location of plaintiff's driveway in relation to Emit Street and the Van Cleef drain some modifications to those structures would also be required.

We believe that the rules and procedures promulgated by defendants were well within the authority conferred upon them by the Driveways, Banner, Events and Parades Act and satisfied the purpose of the Act. Furthermore, the improvements required of plaintiff by defendant were consistent with their published, properly-promulgated rules.

Plaintiff argues that two recent cases dealing with similar circumstances should be controlling by analogy. However, *Arrowhead Development Co* v *Livingston Co Road Comm*, 413 Mich 505; 322 NW2d 702 (1982) and *Charter Twp of Harrison* v *Calisi*, 121 Mich App 777; 329 NW2d 488 (1982) are not controlling in that they involved different statutes and materially different facts.

Next, plaintiff claims that the denial of his driveway permit constitutes a taking of private property without just compensation in contravention of Const 1963, art 10, § 2 and the 14th Amendment to the United States

Constitution, and that it was a denial of equal protection guaranteed by Const 1963, art 1, §§ 2 and 17 and the 14th Amendment of the United States Constitution. We disagree with plaintiff that the act of denying plaintiff a permit unless he made the improvements was a taking. In regard to plaintiff's equal protection claim, plaintiff claims he was treated differently than a nearby landowner, Koza. However, we note that Koza agreed to accept the offer to defer construction until he was more financially able, while plaintiff was offered the same arrangement but declined. In addition, the site chosen by Koza did not require as much work for the installation of a passing lane and some of the work required by Koza's site was completed by the Michigan Department of Transportation for unrelated reasons. Therefore, we find no disparate treatment.

The decision of the trial court is affirmed.

AFFIRMED.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Nathan J. Kaufman

APPENDIX G

JUDGMENT FOR DEFENDANTS, WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY

(State of Michigan — Circuit Court — County of Wayne)

(Dated July 1, 1986)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, Trustee, Plaintiff, v WAYNE COUNTY ROAD COMMISSION, and the BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, Individually and Severally, Defendants – C.A. No. 83 334-841CZ; HON. RICHARD D. DUNN)

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan, on: JULY 1, 1986.

PRESENT: RICHARD D. DUNN,
CIRCUIT COURT JUDGE.

This matter having been tried by the Court, the Court having rendered its opinion, it is adjudged in accordance with the Opinion of the Court that Plaintiffs have no cause for action. The Court gives no costs, a public question being involved.

/s/ RICHARD D. DUNN
CIRCUIT COURT JUDGE

Approved:

/s/ M. GARY HOLLAND, ESQ./*LN, per telephone authority 7-1-86*, Attorney for Plaintiff, 23394 Goddard Road, Taylor, MI 48180;

/s/ LAMBRO NIFOROS, ESQ., Attorney for Defendants, 701 City-County Building, Detroit, MI 48226.

DATED: July 1, 1986

(*Certification Omitted*)

APPENDIX H

OPINION OF COURT

(State of Michigan — Circuit Court — County of Wayne)

(Dated June 19, 1986)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, Trustee, Plaintiff-Appellant, v. WAYNE COUNTY ROAD COMMISSION, and the BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES and HAROLD H. BONDY, Individually and Severally, Defendants — Civil Action No. 83334-841CZ; Hon. Richard D. Dunn (P-13025))

This is an action by the Loyer Educational Trust and its Trustee, Larry McDonald, the plaintiffs herein, against the Wayne County Road Commission and the individual Commission members, the defendants herein, for the issuance of a writ of mandamus, injunctive relief and money damages. The matter was tried by the Court and disposition was withheld pending an opinion by the Court. The Court opines:

FACTS

Sometime prior to 1981, plaintiffs began construction of a commercial shopping center on Sibley Road in Brownstown Township between Interstate 75 and Telegraph Road. The property on which the shopping center is located consists of approximately 3 1/2 acres, with a 350 foot frontage on the south side of Sibley Road. Sibley Road itself is a two lane county road (i.e., one lane westbound, and one lane eastbound) with a posted speed of 45 mph.

When construction was almost completed, plaintiff applied to the defendant, on April 1, 1981, for a permit seeking to install and connect utility lines and a driveway onto Sibley over the Sibley Road right-of-way. In response, defendants notified plaintiffs that they would be required to construct a passing lane opposite the driveway in order to accommodate left turns into the shopping center.

Plaintiffs responded by relocating its driveway into the shopping center from the Sibley Road frontage to a private road west of the shopping center which intersected Sibley Road. Neither the private road, nor the driveway however, had been constructed under the requisite permits.

To obtain these permits plaintiff once again applied to defendants to issue permits. Again the defendants informed plaintiffs that they would be required to construct a passing lane and the closing of a drain on the north side of Sibley in order to accommodate left hand turns.

Approximately two years thereafter, this case was commenced. Although various forms of relief were requested, the issue central to all was whether defendants could legitimately require plaintiffs to construct the passing lane as a precondition to defendants issuing a driveway permit. It is to this dispositive issue that the Court now turns.

ANALYSIS

The requirement that plaintiffs obtain a permit in order to construct their driveway and link it with Sibley Road is a statutory one.

Section 2 of the Driveways, Banners, Events and Parades Act (hereinafter, the Act), MCLA 247.322, pro-

vides in relevant part: "No driveway . . . is lawful except pursuant to a permit issued in accordance with this act." "Driveway" is defined in Section 1(a) of the Act, MCLA 247.321(a) to mean "a driveway, lane, road or any other way providing vehicular access to or from the highway from or to property adjoining the highway . . ."

Inasmuch as plaintiff's private drive and driveway are means of "providing vehicular access to and from the highway" relative to plaintiffs' property which adjoins Sibley Road, it is clear that before plaintiffs could lawfully construct there driveways they were required to seek and obtain a permit. Additionally, because Sibley Road is a county road, the relevant highway authority to issue the permit would have to be the defendants in the instant case.

In regard to the issuing of permits, the Act authorizes a highway authority, such as defendants, to make rules necessary for the administration of the Act. Section 5 of the Act, MCLA 247.325. Rules that are promulgated by the highway authority are to be "consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest."

Section 6 of the Act, MCLA 247.326 further provides in part that "a permit shall not be issued unless all requirements . . . of rules made pursuant to Sec. 5 are met."

In the case at bar, defendants did adopt rules applicable to the issuing of driveway permits.

The *"Rules, Standards, and Procedures for Driveways within Wayne County Road Commission Right of Way* provides at page 10:

> "The permit applicant shall provide a passing lane on the side of the highway directly opposite a proposed commercial, industrial, apartment driveway or other heavy traffic generators when warranted in accordance with the highway vehicle volume and anticipated peak hour vehicle left turns from the highway as shown in Figure 7. When other conditions such as horizontal and vertical sight distance, traffic signal location and other physical factors directly affect public safety, a passing lane shall be required. Minimum dimensions for a passing lane are shown in Figure 8."

Under the foregoing rule, the defendants are clearly authorized and indeed mandated to require a passing lane be constructed when, due to the physical characteristics of the road into which the driveway empties, the public safety is affected.

In the Court's opinion the above rule is one which the defendants could lawfully adopt under the Act. Certainly, all would concede that the presence of a driveway on a highway will always have the potential for interrupting traffic on the highway due to motorists stopping and turning off of the highway to go into the driveway. Additionally, it may be presumed that driveways to commercial establishments will, by their nature, serve to increase the risk to public safety attendant to persons turning off the highway to go into the driveway because of the increased volume that such establishments would generate. Thus a provision, such as a left hand passing lane, which tends to ameliorate the potentially unsafe and congestive condition caused by the driveway would be a rule authorized by section five of the Act. Accordingly, the Court finds that the rule promulgated by the

defendants which authorizes them to require an applicant for a driveway permit to construct a passing lane is a rule authorized by section 5 of the Act. MCLA 247.325. It follows, therefore, that defendants could legitimately require plaintiffs to construct a left turn pass lane in accordance with the foregoing rule. Additionally, when plaintiffs refused to comply with this request, defendants were *required* not to issue the permit. See Sec. 6 of the Act, MCLA 247.326.

Plaintiffs however contend that the results of two cases, *Arrowhead* v. *Livingston County Road Commission*, 413 Mich 505 (1982), and *Harrison Township* v. *Calisi*, 121 Mich App 777 (1982), preclude the above finding.

In *Arrowhead* a county road commission, as a condition to the commission approving a proposed plot, required that a subdivision developer level a hill on a portion of county road near where the road to the subdivision entered the county road. The hill was outside the plot. The Court found that there was neither constitutional authority nor statutory authority which could empower the road commission to require a subdivision developer to make improvements on county roads as a condition for the commission's approval of the proposed plot.

Similarly, in *Harrison Township*, the Court held that neither the Township Rural Zoning Act nor the Township Planning Act empowered a township zoning commission to require a developer's site plan to construct an off site improvement, namely a by-pass lane within the street right-of-way.

However, this case does not involve the approval of a site plan or plot. Rather, it involves the authority of the defendanuts to issue permits for the construction of driveways and public rules reasonably related to the con-

struction of driveways which will maintain the public safety which otherwise would be jeopardized by the driveway's construction. The Court is of the opinion that the defendants' rule requiring the construction of a passing lane comfortably fits within the scope of the defendants' rule making authority under the Act. There being statutory authorization for the rule adopted by defendants, it follows that neither *Arrowhead* nor *Harrison Township* governs this case.

CONCLUSION

From the foregoing discussion it is apparent that plaintiffs' request for the issuance of either writ of mandamus or injunctive relief cannot be granted. The Court is authorized to issue a writ of mandamus only where plaintiffs prove they have a clear legal right to performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform such act, *Dettore* v. *Brighton Township*, 58 Mich App 652, 654-655 (1975). In the case at bar, because the Court has concluded that the defendants have acted in conformity with the Act, the Court further finds that plaintiffs have failed to show they have a clear legal right to have defendants issue the permit, and have also failed to show defendants have a clear legal duty to issue the permit. Indeed, due to plaintiffs' failure to comply with the aforementioned rule, defendants have a clear legal duty *not* to issue the permit.

Having failed to establish their entitlement to the issuance of a writ of mandamus, the defendants similarly are precluded from obtaining injunctive relief since they have not shown that any of their rights to have been violated or that defendants have acted wrongfully. See 13 Michigan Law & Practice, Injunctions, Sec. 75, p. 758.

Finally, in review of plaintiffs claims for damages the Court, in light of the above findings, concludes that plaintiffs have failed to establish any wrongful conduct on the part of the defendants which would render them liable to plaintiffs for damages. In this regard, the Court finds that the expenses and other damages claimed by plaintiffs were not incurred by plaintiffs as a result of any wrongful or misleading conduct by defendants. Indeed, the Court would note that plaintiffs proceeded with the construction of the shopping center without first having ascertained whether they would be able to obtain a driveway permit. The financial predicament that plaintiffs presently may find themselves in is one largely of their own making. Therefore there is neither a legal nor an equitable basis to award damages to plaintiffs in this case.

For the reasons stated above the Court will accordingly grant a judgment of no cause of action on the claims made by plaintiff. An order consistent with the foregoing may be presented within ten days, as per Local Court Rules. No costs are involved, a public question being involved.

/s/ RICHARD D. DUNN,
Circuit Judge

DATED at Detroit, Michigan, June 19, 1986.

(Certification Omitted)

APPENDIX I

ORDER FOR PARTIAL SUMMARY JUDGMENT AS TO BROWNSTOWN TOWNSHIP, ONLY

(State of Michigan — Circuit Court — County of Wayne)

(Dated July 26, 1985)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, v WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, Individually, Jointly and Severally, Defendants — C/A No: 83-334-841-CZ; Honorable Paul S. Teranes)

At a session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, on: JULY 26, 1985.

PRESENT: HONORABLE PAUL S. TERANES,
CIRCUIT JUDGE.

This matter having regularly come for hearing upon the motion of Brownstown Township for Summary Judgment, and the Court being fully advised in the premises,

NOW, THEREFORE, ON MOTION of John A. Gyorgy, Attorney for Brownstown Township:

IT IS HEREBY ORDERED AND ADJUDGED that partial summary judgment as to BROWNSTOWN TOWNSHIP, only, be granted for plaintiff's failure to state a claim upon which relief can be granted.

/s/ PAUL S. TERANES
CIRCUIT JUDGE

(*Certification Omitted*)

APPENDIX J

ORDER GRANTING MOTION TO DISMISS

(State of Michigan — Court of Appeals)

(Certified May 18, 1984)

(LOYER EDUCATIONAL TRUST and LARRY McDONALD, Trustee, Plaintiffs-Appellants, v WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP and HAROLD H. BONDY, Defendants-Appellees, and WAYNE COUNTY BOARD OF COMMISSIONERS, GRACE R. HAMPTON, and CLAUDE DUKES, Defendants — Docket No. 76665, L.C. No. 83303835CZ)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 16th day of May in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable: ROMAN S. GRIBBS, Presiding Judge, JOHN H. GILLIS, HAROLD HOOD, Judges.

In this cause, a motion to dismiss having been filed by defendant-appellee Board of County Road Commissioners, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court;

IT IS ORDERED that the motion to dismiss be, and the same is hereby GRANTED. Since, the February 21, 1984 order did not dispose of the plaintiffs' claim for money

damages, that order is not a final judgment within the meaning of GCR 1963, 518.2 and therefore that order is not appealable by right to this Court. GCR 1963, 806.1. This dismissal is without prejudice to the filing of a delayed application for leave to appeal. In the alternative, a claim of appeal by right will be available when the trial court enters an order disposing of all the claims presented in plaintiffs' complaint.

(Certification Omitted)

APPENDIX K

ORDER DISMISSING ORDER TO SHOW CAUSE AND PETITION FOR MANDAMUS AND INJUNCTIVE RELIEF

(State of Michigan — Circuit Court — County of Wayne)

(Dated February 21, 1984)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, Defendants — C/A No: 83-334-841-CZ; Hon. PAUL S. TERANES)

At a session of said Court held in the Courtroom in the City of Detroit, Wayne County, Michigan, on: FEBRUARY 21, 1984.

PRESENT: HONORABLE PAUL S. TERANES,
Circuit Judge

This matter having come on to be heard and after Briefs having been filed and the parties appearing in open Court for oral argument, and testimony having been taken re: the plaintiff's Motion and petition for injunctive relief or, in the alternative, a Writ of Mandamus, and the Court being fully advised in the premises,

IT IS ORDERED that plaintiff's motion and petition for preliminary injunctive relief or, in the alternative, a Writ of Mandamus, be and is hereby denied.

/s/ PAUL S. TERANES
Circuit Judge

(*Certification Omitted*)

APPENDIX L

COMPLAINT
AND PETITION FOR INJUNCTIVE RELIEF

(State of Michigan — Circuit Court — County of Wayne)

(Dated November 14, 1983)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, Defendant — No. 83-334-841CZ)

COUNT I

NOW COMES the LOYER EDUCATIONAL TRUST, LARRY McDONALD TRUSTEE, by and through attorney, M. GARY HOLLAND, and for complaint says as follows:

1. That the LOYER EDUCATIONAL TRUST is the owner of certain property located on Sibley Road, in the Township of Brownstown, Wayne County, Michigan.

2. That the defendant, BROWNSTOWN TOWNSHIP, is a Michigan Township.

3. That the WAYNE COUNTY ROAD COMMISSION, is a Michigan Municipal Body Corporate.

4. That THE WAYNE COUNTY BOARD OF COMMISSIONERS individually, are residents of Wayne County and sit on the Board of the Road Commission.

5. That the LOYER EDUCATIONAL TRUST had an architectural firm design and draft plans for a strip shop-

ping center on Sibley Road in Brownstown Township, located on the following described property:

> A parcel of land in the N.W. 1/4 of Sec. 9, T.4 S., R.10 E., Brownstown Township, Wayne County, Michigan, described as follows: Commencing at the N. 1/4 corner of Sec. 9, T.4 S., R.10 E., and proceeding thence along the N. and S. 1/4 line of said Sec. 9, S. 1°08'10" E. 60.40 ft. to the point of beginning on the S. line of Sibley Road, 120.00 feet wide, and continuing along said N. and S. 1/4 line, S. 1°08'10" E. 373.18 feet; thence S. 82°17'40" W., 320.94 feet; thence N. 1°08'10" W., 373.18 feet to a point on the S. line of Sibley Road, 120.00 feet wide; thence along said line, N. 82°17'40" E., 320.94 ft. containing 2.7314 acres

6. That L. LOYER CONSTRUCTION COMPANY was employed to do the construction work on the project for the LOYER EDUCATIONAL TRUST.

7. That permits were obtained from the Brownstown Township offices to construct the project and construction began.

8. That the shopping center was constructed in accordance with plans and drawings submitted by an architect, duly licensed and certified and in accordance with permits obtained from Brownstown Township.

9. That the shopping center has been constructed and is ostensibly completed except for connection to water and sewer lines.

The shopping center cannot open due to the refusal by THE WAYNE COUNTY ROAD COMMISSIONERS and WAYNE COUNTY ROAD COMMISSION to issue permits for the tap of certain utilities on Sibley Road and for the widening of Sibley Road adjacent to the shopping center.

10. That as a condition for allowing the shopping center to have ingress and egress on Sibley Road, THE WAYNE COUNTY ROAD COMMISSIONERS have insisted that L. LOYER CONSTRUCTION COMPANY widen Sibley Road by putting a passing lane on both sides of the highway and rerouting a county drain on the opposite side of Sibley Road.

These lane changes to Sibley Road are not pursuant to any driveway plans and are actual road improvements in the right-of-way owned by the County of Wayne.

11. That L. LOYER CONSTRUCTION COMPANY has agreed to make any driveway improvements or approaches connected to the shopping center driveway, but has refused to improve and widen Sibley Road.

That pursuant to Michigan Statutes, THE WAYNE COUNTY ROAD COMMISSION is solely responsible for the improvement of the highway system in Wayne County and cannot condition its approval of a project or a permit to open a private development by forcing a developer to improve *AND FINANCE* a county road.

12. That THE WAYNE COUNTY ROAD COMMISSIONERS have attempted to charge the costs of road improvements to an individual property owner for improvements done adjacent to property without a special assessment district being declared nor by using the taxing authority of the Wayne County Municipality to raise funds for the road improvements as specified by the County.

13. That the LOYER EDUCATIONAL TRUST has been injured in view of the fact that the shopping center has not been able to open on time, that leases have been canceled, and terminated, that danger of fire, added insur-

ance premiums have been incurred due to the vacant building located on the property and that rents and profits have been lost.

14. *INJUNCTIVE RELIEF* That unless this Court issues an injunction restraining the defendants, each and all of them, from interfering with the opening of the shopping center, plaintiff will be irreparably harmed and have no adequate remedy at law due to loss of opportunity and time, and risk of loss due to fire and vandalism. That this Court may properly restrain the defendants from interfering with the opening of the shopping center because the defendants will not be prejudiced, if the Court later finds the plaintiff liable for road improvements, however the prejudice to plaintiff is overwhelming in light of the illegal and improper action taken by the defendants by threatening plaintiff and denying it permission to open for business.

15. That the LOYER EDUCATIONAL TRUST has been injured to the extent of $750,000.00 due to lost profit, proceeds, competition for not being able to open due to the wrongful conduct of THE WAYNE COUNTY ROAD COMMISSION.

WHEREFORE, the LOYER EDUCATIONAL TRUST requests damages in the amount of $750,000.00, plus costs, interest and attorney fees so wrongfully sustained and for further continuing damages as they shall accrue.

FURTHER, the LOYER EDUCATIONAL TRUST requests punitive damages in the amount of $750,000.00 due to the wrongful conduct of THE WAYNE COUNTY ROAD COMMISSIONERS, the COMMISSION, and its Commissioners individually, plus costs, interest and attorney fees.

FURTHER, plaintiff requests that this Court issue an Order to Show Cause to compel Defendants to show cause why an Injunction should not be issued barring them from interfering with the opening of the shopping center.

COUNT II
REQUEST FOR MANDAMUS

1. Plaintiff incorporates all of the Paragraphs as alleged in Count I of the Complaint.

2. The LOYER EDUCATIONAL TRUST has done and offered to do all things necessary to construct an approach for its drive entering the shopping center.

3. That THE WAYNE COUNTY ROAD COMMISSION has wrongfully refused to allow L. LOYER CONSTRUCTION COMPANY to provide the approaches on its own property entering into the shopping center from Sibley Road.

4. That nothing remains to be done by the L. LOYER CONSTRUCTION COMPANY, except to obtain a permit to put in approaches to the driveways entering into Sibley Plaza Shopping Center.

5. That the LOYER EDUCATIONAL TRUST requests that this Court order the defendants to issue permits allowing the L. LOYER CONSTRUCTION COMPANY to proceed with construction of approaches on the south side of Sibley Road into the shopping center, and further, to allow the L. LOYER CONSTRUCTION COMPANY to connect to any utilities and sewer connections by doing all things necessary, in addition to tunnelling under Sibley Road by means of boring, or otherwise, to connect to the water and sewer system on the north side of Sibley Road. LOYER EDUCATIONAL TRUST requests that the Court order a Certificate of Occupancy to be issued

once the utilities have been tapped and inspection of the building has been completed by the Brownstown Township Building Authority and The Wayne County Road Commission.

COUNT III

Now comes plaintiff in its Count III and says as follows:

1. That the LOYER EDUCATIONAL TRUST has been discriminated against and its beneficiaries have been directly affected by discriminatory practices of THE WAYNE COUNTY ROAD COMMISSION and its individual members, in denying a permit to tap into public utilities without first making public improvements to a road in contravention of the Michigan Statutes requiring THE WAYNE COUNTY ROAD COMMISSION to be in charge of Wayne County Roads and further, setting strict rules for financing of improvements to County Roads.

2. That due to the relationship between the L. LOYER CONSTRUCTION COMPANY and the LOYER EDUCATIONAL TRUST, THE WAYNE COUNTY ROAD OF COMMISSIONERS has, in violation of both Michigan and Federal Civil Rights Acts, deprived the beneficiaries of the LOYER EDUCATIONAL TRUST of certain rights as allowed by law.

3. That the relationship between the L. LOYER CONSTRUCTION COMPANY and the LOYER EDUCATIONAL TRUST was exploited by THE WAYNE COUNTY BOARD OF COMMISSIONERS and its employees and individual members in attempting to have the L. LOYER CONSTRUCTION COMPANY make some FREE road improvements for the County of Wayne, and the taxpayers of the

County of Wayne in direct contravention and violation of the statute which creates THE WAYNE COUNTY ROAD COMMISSION and sets forth its authority.

WHEREFORE, the LOYER EDUCATIONAL TRUST and its beneficiaries request damages in the amount of $750,000.00 for violation of their Michigan Civil Rights and Federal Civil Rights, plus costs, interest and attorney fees so wrongfully sustained.

M. Gary Holland P23197
Attorney for Plaintiff
23394 Goddard Road
Taylor, Michigan 48180

November 14, 1983

APPENDIX M

EXCERPTED TRIAL COURT TRANSCRIPT

— *Plaintiff's Request for Damages for Discrimination* —

* * *

(318) THE COURT: You may proceed.

MR. HOLLAND: Thank you, Your Honor.

Your Honor, I just have a couple of points to make on my closing argument here.

I think number one, the Court has to take notice that this passing lane requirement imposed by the County was unreasonable. It was unreasonable because it also required that the Van Cleef drain was to be enclosed, and that paving had to be done in a private intersection.

The County in failing to work out any reasonable solution to the problem kept the Loyer project closed up for over four years.

While keeping Mr. Lawyer's [*sic*] project closed up for over four years, they had helped competitors of Mr. Loyer, just down the street, at virtually no cost to him allowing him to meet the passing lane requirement.

This also allowed him to open up sooner. I think that based on these facts, the Loyer claim for damages of one hundred nine thousand dollars per year for the years that he was closed up totals four hundred thirty-six thousand dollars.

Mr. Loyer, basically, the Educational Trust is asking for a like sum of four hundred thirty-six thousand dollars for damages for the discriminatory (319) action taken against him by the county. This was absolute discrimination, Your Honor.

The primary legal points that we have to make are in the Arrowhead and Calisi cases. Arrowhead and Calisi,

developed a legal pattern, if you will, that says that private individuals should not have to pay for public right-of-way improvements.

There is no system that is set up for that. And I don't think the Driveway Act would overcome the decisions of Arrowhead and Calisi. Even in the Driveway Act, Your Honor, the County can promulgate rules under this Driveway Statute; however, these rules have to be reasonable.

And these rules were not applied reasonably in Mr. Loyer's situation. And the statute, it says that nobody shall be denied reasonable access to the highway because of this Driveway Act.

I don't think that the county can promulgate rules that go beyond the scope of the act. The Driveway Act itself is designed to handle driveways. It is not designed to proportion the expenses for public right-of-way improvements, Your Honor, and I think that, therefore, the Driveway Act would also be within the parameter of Arrowhead.

In fact, in Arrowhead, it is in a Supreme (320) Court, in a footnote, discussed the Driveway Act. Therefore, I think that the Loyer Educational Trust is requesting relief by way of damages. Also we request that the permits be issued which would allow the Loyer Educational Trust to complete and open up the Sibley Plaza Shopping Center.

Thank you, Your Honor.

MS. NIFOROS: Perhaps I misheard, Your Honor, I thought that in addition to the Trust asking for damages that Mr. Holland also asked for damages on Mr. Loyer's behalf. But the only named Plaintiff in the matter is Loyer Trust and trustee who has never appeared here.

If I misheard then that is fine.

MR. HOLLAND: I am only asking for damages for the Loyer Educational Trust, Your Honor.

MS. NIFOROS: Okay.

* * *

APPENDIX N

RELEVANT STATUTORY PROVISIONS

MCLA § 247.321 *ET SEQ.*

DRIVEWAYS, BANNERS, EVENTS AND PARADES

Act 200, 1969, p 382; imd eff August 6.

[Title as amended by Pub Acts 1981, No. 177, imd eff December 14, which contained a section 2 providing: "This amendatory act shall not take effect unless Senate Bill No. 462 of the 81st Legislature [which became Act No. 178] is enacted into law."]

AN ACT to regulate driveways, banners[, events,] and parades upon and over highways[; to provide for the promulgation of rules; to prescribe requirements for the issuance of permits; and to provide for the issuance of those permits].

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

§ 9.140(21) Definitions.]

Sec. 1. As used in this act:

(a) "Driveway" means a driveway, lane, or road or any other way providing vehicular access to or from the highway from or to property adjoining the highway but does not mean a city or village street or other highway covered by the provisions of Act No. 288 of the Public Acts of 1967, being sections 560.101 to 560.293 of the Compiled Laws of 1948.

(b) "Highway" means a state trunk line highway or a county road including the entire right of way.

(c) "Highway authority" means the department of state highways in the case of state trunk line highways, and the board of county road commissioners in the case of county roads. (MCL § 247.321.)

Statutory references. Act No. 288 of 1967, above referred to, is § 26.430(101) et seq., infra.

§ 9.140(22) Necessity for permit; other regulations.]

Sec. 2. No driveway, banner or parade is lawful except pursuant to a permit issued in accordance with this act unless otherwise provided. Nothing in this act shall be construed to prevent the application of the provisions of any other statute of this state or any local ordinance which is more restrictive than this act nor to preclude any city or village from requiring city or village permits with respect to any street or highway within its corporate limits. No permit shall be issued pursuant to this act unless there is compliance with other provisions of law or ordinances. (MCL § 247.322.)

§ 9.140(23) Permits; requests; traffic handling arrangements; objects overhanging traveled ways; exception.]

Sec. 3. [A permit] to temporarily close a highway, or a portion of the highway, for a parade, celebration, festival, or similar activity, and [a permit] for banners, decorations, or similar objects to overhang the traveled way of a highway, may be issued by the highway authority only if requested by an authorized official designated by resolution of the governing body of a city, incorporated village, or township. Requests for tempo-

rary closing of highways shall indicate the time and date the highway is to be closed to traffic, the date and time the highway is to be reopened to traffic, and ♦ other information as the highway authority may require. ♦ [A] permit shall [not] be issued for the partial or complete closing of a highway unless the highway authority is satisfied that adequate arrangements have been made for the handling of highway traffic during such closure. Permits for banners, decorations, or similar objects over the traveled way of a highway shall require that they be securely fastened and be at least 18 feet above the surface of the traveled way. [This section does not apply to a racing event for which a permit has been issued under the city motor vehicle racing act of 1981.] (MCL § 247.323.)

History. As amended by Pub Acts 1981, No. 177, imd eff December 14, which contained a section 2 providing: "This amendatory act shall not take effect unless Senate Bill No. 462 of the 81st Legislature [which became Act No. 178 of 1981] is enacted into law."

§ 9.140(24) Rules and standards.]

Sec. 4. Permits for driveways shall be granted in conformity with rules promulgated by the highway authority which shall be consistent with the public safety and based upon the traffic volumes, drainage requirements and the character of the use of land adjoining the highway and other requirements in the public interest. Rules shall prescribe reasonable standards for the design and the location of driveways and may require that driveways shall be hard-surfaced. The provisions of this section shall not be deemed to deny reasonable access to a nonlimited access highway. (MCL § 247.324.)

§ 9.140(25) Rules; adoption by reference; procedure.]

Sec. 5. The department of state highways shall make rules necessary for the administration of this act in

accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and being subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948. The boards of county road commissioners may adopt by reference the rules, in whole or in part, of the department of state highways or may adopt its own rules after a public hearing of which notice has been given by publication at least twice in a newspaper circulated in the county not more than 30 days nor less than 7 days prior to the hearing. (MCL § 247.325.)

Statutory references. Act No. 88 of 1943, above referred to, is § 3.560(7) et seq., since repealed; Act No. 197 is § 3.560(21.1) et seq., which was repealed by Pub Acts 1969, No. 306, eff July 1, 1970.

§ 9.140(26) Requirements for issuance of permit; revocation; exception.]

Sec. 6. ♦ [A] permit shall [not] be issued unless all the requirements of this act, and of rules made ♦ [pursuant to] section 5, are met. A permit may be revoked by the highway authority issuing it if at any time the permitted object, use, or activity fails to meet the requirements of this act or rules made in accordance with section 5. [This section does not apply to a permit issued by a city under the city motor vehicle racing act of 1981.] (MCL § 247.326.)

History. As amended by Pub Acts 1981, No. 177, imd eff December 14, which contained a section 2 providing: "This amendatory act shall not take effect unless Senate Bill No. 462 of the 81st Legislature [which became Act No. 178 of 1981] is enacted into law."

§ 9.140(27) Preexisting driveways; land served changed or expanded, effect; rule violations; corrections; failure to correct.]

Sec. 7. ♦ This act shall not apply to driveways in existence on ♦ [August 6, 1969, except that if the use of

the land served by the driveway is changed or expanded, and the change or expansion causes the existing driveway to be a safety hazard, the driveway shall be considered a new driveway subject to] this act. ♦ [A] driveway which is constructed or reconstructed after the effective date of the rules issued pursuant to this act and which is in violation of the rules shall be corrected by the owner within a period of time, not less than 30 days, specified in the notice of violation sent by certified mail to the owner. If not ♦ corrected within the period required by the notice, the highway authority or its agents may perform the necessary correction and the owner shall reimburse the highway authority for the reasonable cost of correction. [MCL § 247.327.]

History. As amended by Pub Acts 1978, No. 83, imd eff March 29.

§ 9.140(28) Preservation of authority to acquire property.]

Sec. 8. Nothing in this act shall limit the right of the highway authority in the exercise of its authority to acquire property for highway purposes or to widen, relocate, reconstruct, improve or maintain any highways. [MCL § 247.328.]

§ 9.140(29) Authorization of municipality to issue permits.]

Sec. 9.

[(1) Except as provided in subsection (2),] the state ♦ [transportation] commission by resolution may authorize any city or village to issue on behalf of the state the permits required by this act with respect to state trunk line highways within the corporate limits of the city or village provided the permits are issued ♦ [pur-

suant to] this act and rules promulgated ♦ [under] this act, subject to ♦ conditions as the commission may prescribe and subject to acceptance of [that] authority by the governing body of the city or village.

Permit under city motor vehicle racing act.]

[(2) A permit issued by a city under the city motor vehicle racing act of 1981 shall be considered to be a permit issued for all purposes under this act regarding any highway located within the limits of the city.] (MCL § 247.329.)

History. As amended by Pub Acts 1981, No. 177, imd eff December 14, which contained a section 2 providing: "This amendatory act shall not take effect unless Senate Bill No. 462 of the 81st Legislature [which became Act No. 178 of 1981] is enacted into law."

28 USC § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch 646, § 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P.L. 100-352, § 3, 102 Stat. 662.)

42 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979, Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)